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IN THE

# Supreme Court of the United States

October Term, 1954

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No. 376

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JOHN P. PETERS, *Petitioner,*

v.

OVETA CULP HOBBY, ET AL., *Respondents.*

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## REPLY BRIEF FOR THE PETITIONER

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## REPLY BRIEF FOR THE PETITIONER

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### I.

### THE ISSUE

From reading the government's brief one gets the impression that the issue in this case is whether the courts may interfere with the selection and removal of government personnel. The Attorney General appears to think that the elaborate inquisition called the loyalty and security program with its hierarchy of trial and appellate tribunals, with its army of informers, with its periodic announcement of new totals of victims, is an incident of ordinary personnel management and therefore beyond the protection of the Constitution.

It is our position that proceedings under the loyalty program are not a part of routine personnel management;

and further, that the government's power with respect to its personnel is subject to constitutional limitations in certain situations.

*Wieman* v. *Updegraff*, 344 U. S. 183, establishes the latter point: that the constitution is applicable to the government's power to dismiss employees. *Wieman* holds that the Government may not discharge employees for prohibited reasons—that is, on the basis of arbitrary and "indiscriminate classifications".

The issue in the present case is whether the constitution also applies to the dismissal of an employee for disloyalty, after a formal hearing. The answer to this, we believe, must be in the affirmative. The government may dismiss employees for such reasons as it chooses, limited only by such constitutional considerations as *Wieman* v. *Updegraff* illustrates. But where the reason for dismissal is alleged disloyalty, and where the Government purports to determine disloyalty by means of a formal hearing held pursuant to elaborate regulations, the basic requirements of due process must be observed.[1]

The government does not deny the terrible damage caused by a dismissal for disloyalty (Resp. Br. 57). It seeks, instead, to cramp the issues raised by this case within the narrow principles which govern a routine dismissal. A mass of cases are marshalled to prove that the Constitution does not limit the executive's managerial power to hire and fire (Resp. Br. 31-41). These cases are all beside the point. None involved a formal adjudication of disloyalty to the United States by an administrative board.

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[1] The Attorney General's argument that the executive power over government employees is "plenary", if pressed to its logical conclusion would permit the executive to stigmatize an employee as disloyal without even a limited hearing. Even if we assume that the Government could dismiss employees for disloyalty without a hearing, when the Government provides for an adjudication pursuant to a hearing, it must comply with basic due process requirements. Cf. *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 571 (a state may arbitrarily exclude a foreign corporation, but once admitted the corporation must be accorded equal protection).

Never before either in times of war or peace has the government resorted to anything remotely resembling the loyalty program (see pp. 16-17, *infra*). Neither has any such program been adopted by industries which are far closer to national defense than the Department of Health, Education and Welfare. Nor has any labor union sought to protect itself from infiltration of Communists by setting up this kind of a formal inquisition. They have solved their problems with Communists quietly and efficiently without spreading fear and distrust throughout their organizations.

The General Electric Company is a vast organization deeply involved in national defense and in the possession of government secrets. It is a far richer field for Communist exploitation than is the field of public health. In the tumult and shouting that has accompanied the loyalty program the heads of that company found it necessary to reassure their employees that they had no intention of establishing a loyalty program to judge men's qualifications by presenting the testimony of secret informers to boards of prominent citizens selected from Who's Who.[2] General Electric repudiated this notion as a function of management. It said that private employers "cannot and should not be expected to embark privately upon sweeping programs for judging the loyalty of employees" because the "government, not private citizens, must identify traitors—and that this government duty could not safely or properly be left to private citizens." A. A. Berle, Jr., *The 20th Century Capitalist Revolution* 91 (1954).

The truth of these statements is obvious. No rational employer would believe that he could promote efficiency by employing an army of secret informers, by collecting gossip, by staging hearings which precluded any opportunity to explain and refute, thus spreading fear, confusion and suspicion throughout the enterprise.

The basic question in this case, therefore, is not whether

[2] See Resp. Br. 103, fn. 46.

the executive branch of the government can exercise the normal and usual managerial prerogative of discharging employees who are unsuitable without a fair hearing. Of course it can. But the executive department in this case was not engaged in making an ordinary managerial judgment that an individual is unsuitable. It was engaged in making a formal determination that an individual is disloyal to the United States. It was trying and condemning an individual for unworthiness of character. It was adjudicating a status. This is, therefore, not an ordinary dismissal case.

The true issue in this case is whether the government in its quasi-judicial capacity can try and condemn a citizen as disloyal to his country by a formal hearing which has all the appearance of a trial but not its substance, specifically the right to confront and examine one's accusers.

## II.

## POSITION OF THE PARTIES

It may be helpful at the outset to summarize each party's position with respect to the constitutional provisions in issue.

### A. The Government's Position

**Due Process**

(i) The government contends that nothing in the constitution limits the executive power to appoint and discharge federal employees. It asserts that the power to determine qualifications for federal employment is committed to "executive discretion" and that the courts cannot be called upon to "supervise the action of executive officials" (Resp. Br. 31, 33-34). Proceeding from these principles, the government states that "loyalty to the Government of the United States is a reasonable qualification for public employment" (Resp. Br. 51-52), and that the loyalty program is an appropriate exercise of the executive's power to select qualified personnel which is not limited by the due process clause.

(ii) The government maintains that *Wieman* v. *Updegraff*, 344 U.S. 183, decided only that the executive cannot arbitrarily exclude individuals from government employ "on grounds having no reasonable relationship to the efficiency of the public service" (Resp. Br. 51). The government denies that *Wieman* v. *Updegraff* may properly be construed to require fair procedure in determining qualifications for public office (Resp. Br. 56).

(iii) However, if *Wieman* v. *Updegraff* is read to require fair procedure in connection with a finding of disloyalty, the government claims the requirement was satisfied by the procedure in this case (Resp. Br. 59-70). The government concedes that a procedure which denies "confrontation and cross-examination may, in some circumstances, be 'patently' arbitrary" (Resp. Br. 60). But due process, it asserts, "is a variable concept, to be measured in the light of all surrounding circumstances" (Resp. Br. 59). In determining the procedure required by the Fifth Amendment the court must weigh the "precise nature of the interest that has been adversely affected", it must consider the alternatives available, and it must balance the "hurt complained of and good accomplished" (Resp. Br. 60-61). In this case, protection of the individual interest must yield to national security which, the government maintains, "demands that certain types of information be kept confidential and that the employee be denied confrontation and cross-examination of confidential informants" (Resp. Br. 24).

**First Amendment**

(iv) The government maintains that "the First Amendment cannot be regarded as placing any limitation on the executive power of removal from Government office" (Resp. Br. 79). It concedes "that, as a practical matter, the Order may have acted as a deterrent to employees in the exercise of First Amendment rights" (Resp. Br. 89). But it claims that such restraint was indirect and remote,

that the test is not whether there is a clear and present danger, and that there was a reasonable basis for the executive judgment underlying the loyalty program (Ibid).

*Alternatives*

(v) We understand the Attorney General to maintain that there is no alternative to the procedure followed in this case if national security is to be protected against Communist infiltration.

## B. Petitioner's Position

**Due Process**

(i) Petitioner submits that the executive power to establish a loyalty program whereby citizens are tried and condemned as disloyal is subject to the limitations of the due process clause. Petitioner concedes that in the exercise of its managerial power the executive may employ and discharge persons without a hearing which conforms to the requirements of due process. But petitioner contends that the loyalty program is a process of trial and condemnation and is not an exercise of the managerial power.

(ii) Petitioner maintains that *Wieman* v. *Updegraff* held squarely that power over governmental employees is limited by the due process clause. The government's attempted distinction is without merit; arbitrary procedure is just as offensive to due process as the establishment of arbitrary substantive qualifications.

(iii) Petitioner accepts the government's view that due process is an historically evolving concept which requires the court in each case to balance the interests involved and the alternatives available. Petitioner submits that the interest of the accused in his reputation and career and that of the government itself in maintaining decent and civilized procedure requires fidelity to the historic and basic right of confrontation.

**First Amendment**

(iv) Petitioner contends that the loyalty program abridges the First Amendment by deterring federal employees from freely exercising freedom of speech and freedom of association. Under the loyalty program an individual who expresses unorthodox views may find himself disgraced and ruined merely because he expresses unacceptable views. There is neither clear and present danger nor reasonable necessity to justify so serious a deterrent to the exercise of First Amendment rights by the petitioner or the more than two million federal employees.

*Alternatives*

(v) The government has available to it numerous alternatives, if it is genuinely concerned with securing trustworthy employees, which do not involve formal adjudications of disloyalty by executive hearing boards.

## III.

## THE EXECUTIVE HAS NO POWER TO ADJUDGE A CITIZEN TO BE DISLOYAL EXCEPT BY TRADITIONAL DUE PROCESS PROCEDURE

The government in its brief (Resp. Br. 60) takes as the standard to determine whether the Fifth Amendment was violated in this case the explanation given to the due process clause by Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 163:

> "Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.
>
> • • •
>
> "The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to

> the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment."

The government has chosen this as the standard most applicable to this case and we accept it as such. What then are the interests affected by the procedure in this case? What were the available alternatives to the procedure that was followed?

### A. The Interests Involved

The first interest affected is that of the accused in his good name and in his capacity to earn a livelihood. Persons who are discharged on grounds of loyalty, in the words of Seth Richardson, the former Chairman of the Loyalty Review Board, are "ruined everywhere and forever."[3] The reputation of such persons is stained indelibly. The loss of the government job is incidental. Hardship may be a consequence of loss of employment, but not disgrace or infamy. Such persons may wander through the community from employer to employer, always to be told that no employment is available because of some unspecified charge by some unnamed individual who cannot be revealed.[4]

The second interest affected is that of the government itself. Much more is involved in this case than the good name of Dr. John Punnett Peters. The government itself has a deep and immeasurable interest in fair procedure. The opinion of Mr. Justice Frankfurter in *Joint*

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[3] Quoted in Bontecou, *The Federal Loyalty-Security Program* 65 (1953).

[4] An executive of the Douglas Aircraft Company recently told a Senate Committee that his firm would not employ a person in any position, sensitive or non-sensitive, who had been denied a security clearance. Hearings Before Subcommittee on Reorganization of the Committee on Government Operations on S. J. Res. 21, 84th Cong. 1st Sess., p. 779 (March 14, 1955) [stenographic transcript].

*Anti-Fascist Refugee Committee* v. *McGrath, supra,* upon which the government relies, speaks of the "feeling, so important to a popular government, that justice has been done." 341 U.S. at 172. That opinion quoted Daniel Webster's statement that " 'In a government like ours, entirely popular, care should be taken in every part of the system, not only to do right, but to satisfy the community that right is done'." (Ibid). It referred to the opinion of Lord Chief Justice Goddard in *Rex* v. *Bodmin J. J.*, [1947] 1 K.B. 321, 325, in which the court quashed a conviction where a witness had been interrogated in the absence of the defendant, saying that "Time and again this Court has said that justice must not only be done but must manifestly be seen to be done."[5] The procedure followed in this case does violence to this principle.

There are practical as well as moral considerations which forbid the executive to degrade the institution of trial by due process. The suppression of unorthodox thought among public servants is profoundly serious. Sound government policy results from the free play of ideas and the frank interchange of opinion without fear of reprisal years later when circumstances have changed. The effectiveness and morale of all government employees are immeasurably damaged by the realization that their reputations and careers may be at the mercy of psychopathic liars, ignorant busybodies, and malicious talebearers who are shielded from exposure by cross-examination.[6]

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[5] A related thought is reflected in Justice Holmes' oft-quoted dissent in *Olmstead* v. *United States*, 277 U.S. 438, 469: "We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part." Cf. *Woodruff* v. *Trapnall*, 10 How. 190, 207: "We naturally look to the action of a sovereign state to be characterized by a more scrupulous regard to justice, and a higher morality than belong to the ordinary transactions of individuals."

[6] The "depressing effects upon morale" of government employees caused by the loyalty and security programs were noted by the Hoover Commission:

> "The handling of security cases has been such as to lead to very general views within the service that determinations are

The Attorney General insists, however, that the interest of national security is so overriding as to justify jettisoning fundamental procedural rights. He claims that national security requires protection of paid and unpaid informers,[7] and that the usefulness of such persons will be ended and secrets disclosed if confrontation and cross-examination are held to be required by the Constitution (Resp. Br. 104-106). The Attorney General does not document the assertion that the nation's security will be endangered by fair procedure in cases involving governmental employees. Other persons who have occupied high government position and who are more objectively acquainted with the problems of loyalty and security, disagree with the Attorney General that confrontation and cross-examination will impair the nation's safety.[8] See

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not sufficiently judicial in character (spirit being as important as procedure) to make for valid decisions. There is fear that honest and loyal employees can be destroyed by unsupported or trivial derogatory charges; there is fear that security authorities can be stampeded; and there is fear that security charges are at times a means of making 'political' removals." Commission on Organization of the Executive Branch of the Government, *Task Force Report on Personnel and Civil Service* 121 (Feb. 1955).

A recent report to the American Orthopsychiatric Association stressed the damage to mental health caused by unspecified charges by nameless informants. N. Y. Times, March 3, 1955, p. 11, col. 1.

[7] See Matusow, *False Witness* (1955). This admitted perjurer was once a paid informer. How many like him are concealed by the system which the Attorney General defends in this case?

[8] The late Justice Jackson, who as a former Attorney General was familiar with the problems confronting the executive, condemned the use of secret testimony in these words: "In the name of security the police state justifies its arbitrary oppressions on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected." *U. S. ex rel Knauff* v. *Shaughnessy*, 338 U.S. 537, 551 (dissenting opinion).

e.g., statements of Dr. Vannevar Bush, formerly Director of the Office of Scientific Research and Development, quoted in Brief of Petitioner 13; Harry P. Cain, member of Subversive Activities Control Board, Address to Conference on Civil Liberties, reprinted in 101 Cong. Rec. 2683-2691 (March 18, 1955) (unbound).[9]

In any event, apart from the provision of Article 1, Section 9 authorizing the suspension of the privilege of the writ of habeas corpus "when in cases of Rebellion or invasion the public safety may require it", the Constitution does not sanction the suspension of its provisions in time of alleged emergency. Even the war power, which is virtually without "qualification or limitation", *United States* v. *MacIntosh*, 283 U.S. 605, 622-23, has been held "subject to applicable constitutional limitations", and specifically to the due process clause. *Hamilton* v. *Kentucky Distilleries Warehouse Co.*, 251 U.S. 146. The government unsuccessfully sought to defend the President's seizure of the steel plants as "necessary to avert a national catastrophe". *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 582. Surely, our free institutions are not in such peril as to warrant abandonment of our historic ideal of a fair hearing. Fair procedure will not prevent the Government from detecting wrongdoers among its employees or from safeguarding the nation's security.

### B. The Alternatives

One of the factors the Attorney General asks the court to weigh in determining due process here is whether there is an alternative to the procedure adopted by the government. The Attorney General implies that there is none

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[9] Rep. Martin Dies, formerly Chairman of the House Un-American Activities Committee, stated after defending an employee accused of disloyalty: "I know the accused ought to be confronted with witnesses. . . . [The proceeding] frightened me, because it seemed so contrary to what I always believed was fundamental American fair play." *The Washington Daily News*, March 21, 1955, p. 5, col. 1.

consistent with national security. If so then our great corporations, our essential public utilities, our whole defense effort is in imminent danger. Our army is particularly vulnerable because the executive has not yet deemed the use of secret unsworn testimony to be necessary in giving dishonorable discharges to the persons most directly involved with security—the military. The executive regulation implementing the Uniform Code of Military Justice guarantees confrontation and cross-examination in court martial proceedings.[10] See Gardner, *Bailey* v. *Richardson and The Constitution of the United States*, 33 Boston U. L. Rev. 176, 193-197 (1953). Indeed, the procedure followed in this case has not been deemed necessary by the government even in time of war. See p. 17, *infra.*

The punitive character of the loyalty program and its utter lack of rational connection with either security or personnel management is dramatically illustrated by this case. There was no necessity in the interest of national security to brand Dr. Peters as disloyal. This distinguished physician and scholar was not engaged in sensitive work. He was merely a consultant to the Surgeon General in connection with proposals to grant federal assistance to medical research institutions under the Public Health Laws (R. 3). Dr. Peters' duties required his presence in Washington for only four to ten days each year (R. 15). He was sent notice of his separation from the govern-

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[10] The Uniform Code of Military Justice provides in relevant part that "no officer shall be dismissed from any of the armed forces except by sentence of a general court martial * * *." 50 U.S.C. § 739. The President was authorized by Congress to prescribe "[t]he procedure, including modes of proof, in cases before courts-martial * * * which shall, so far as he deems practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts. . . ." 50 U.S.C. § 611(a). By E.O. 10214, 16 Fed. Reg. 1303 (1951), the President prescribed the 'Manual for Courts Martial, United States, 1951'." The Manual (Section 139) forbids the use of testimony which is not "sworn and subject to cross-examination, the scrutiny of the court and confrontation by the accused."

ment service on June 12, 1953 (R. 21), about six months before the expiration of his term on December 31, 1953 (R. 16). It would have been a simple matter for the government not to call him to Washington for consultation and not to renew his appointment when it expired. Even the excuse of saving the government money is lacking; Dr. Peters was not on the payroll. And yet the government claims that there was no alternative if America is to be secure except to brand Petitioner.[11]

Plain common sense tells us that there are plenty of alternatives if the Government is genuinely concerned with safeguarding security while also protecting individual rights. The executive could follow the practice successfully employed in England where persons who are regarded as security risks are transferred from sensitive to non-sensitive positions. Bontecou, *op. cit. supra* note 3, at 271.[12] The government could also summarily dismiss without a hearing persons it deems untrustworthy in order to "promote the efficiency" of the service. Civil Service Act, 37 Stat. 522, as amended, 62 Stat. 354, 5 U.S.C. § 652

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[11] Applying the rule that statutes which curtail individual rights should be "narrowly drawn", *Cantwell* v. *State of Connecticut*, 310 U.S. 296, 311; *Thornhill* v. *Alabama*, 310 U.S. 88, 105, the Government was required to follow the alternative that would entail minimum damage to Petitioner.

[12] The government in its brief describes at length the measures taken by the British government (Resp. Br. 65-67, fn. 18). But the government omits the most significant fact, namely that the British program is limited to persons " 'employed in connection with work the nature of which is vital to the security of the state', or, in current jargon, 'top secret' material." Bontecou, *op. cit supra* note 3, at 263. As of March, 1954, only 24 individuals had been dismissed from the British civil service pursuant to this program, while 72 had been transferred to non-sensitive duties. *The London Times*, March 17, 1954. It is also noteworthy that under the British system "an adverse judgment amounts only to a decision that a particular individual is unsuitable for a particular post and does not carry with it, as does a judgment of 'disloyalty' any general moral stigma." Bontecou, *Id.* at 271.

(a). See also the procedure followed by President Wilson in World War I, p. 16, *infra*.

In any event, even if the peril were as great as the Attorney General suggests, there would be no justification whatever for sham hearings. The government in its brief professes to be startled by the suggestion that it would be better to have no hearings than an unfair hearing (Resp. Br. 102-103, fn. 45). The loyalty hearing presents to the community the illusion of a result arrived at by an independent and informed deliberative body which has weighed the evidence and afforded the defendant his day in court. The stigma of a discharge made in such circumstances is obviously of far greater impact because the employee will be understood to have been dismissed, not arbitrarily, but after what is purportedly a quasi-judicial proceeding. A summary dismissal program would put an end to the deception inherent in a proceeding which has the cloak of due process without its substance.

### C. Wieman v. Updegraff Precludes Arbitrary Procedure

The core of the government's conceptual argument in this case is the contention that the executive power to establish a loyalty program and to discharge federal employees is "plenary" and "unrestricted" (Resp. Br. 23, 31). The government denies that these powers are subject to constitutional limitations. It insists that the due process clause is "inapplicable to the removal of Government employees" and that the "First Amendment cannot be regarded as placing *any* limitation on the executive power of removal from Government office" (Resp. Br. 41, 79) (emphasis added)

These are sweeping contentions. They are clearly at variance with the ruling of this Court in *Wieman* v. *Updegraff*, 344 U.S. 183, 192:

> "It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pur-

suant to a statute is patently arbitrary or discriminatory."[13]

The government maintains, however, that *Wieman* v. *Updegraff* decided only that, under the due process clause, the executive cannot establish arbitrary qualifications for office, but that due process does not limit the procedure to be followed in determining whether the employee meets the qualifications specified (Resp. Br. 56). In other words, the government claims that in this situation due process requires "due substance" but does not require "due procedure." Patently, however, arbitrary procedure leads to arbitrary substantive results. Something more may be required by due process than procedural fairness, but that is what it minimally and most uncompromisingly requires.[14] Indiscriminate classification of the loyal with the disloyal is no less objectionable than the "indiscriminate classification" of the innocent with the knowing which this Court condemned in *Wieman* v. *Updegraff*, 344 U.S. at 191. Procedure which leads to such arbitrary classification is fatally defective. The government's argument is an extraordinary inversion of the historic debate over substantive and procedural due process[15] and is clearly untenable.

The question in this case, therefore, is not whether the executive power in discharging government employees is subject in appropriate cases to the procedural and substantive limitations imposed by due process clause and

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[13] We do not understand the government to challenge this Court's pronouncement in *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100,

> "that federal employees are protected by the Bill of Rights and that Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office. . .'"

[14] "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb* v. *United States*, 318 U.S. 332, 347.

[15] See Walton H. Hamilton, "The Path of Due Process of Law" in *The Constitution Reconsidered* 167 (Conyers Read ed. 1938).

the First Amendment. Those issues have already been settled by this Court adversely to the claims pre[illegible]d by the government. The true issue is whether the executive is acting arbitrarily when it stigmatizes a citizen as disloyal without affording him an opportunity to confront and cross-examine his accusers.

### D. History Does Not Support the Executive Action

The historical parallels which the government purports to find are so dissimilar to the present case that they do not constitute even a precedent, much less authority for the present action.[16]

The spoils system, to which the government repeatedly alludes (Resp. Br. 21, 42, 78) did not involve adjudications of status and character; a person dismissed for political reasons was not stigmatized with a "badge of infamy" after a formal hearing before an executive board. President Wilson's confidential executive order during World War I, cited as a precedent by the government (Resp. Br. 71-72) provided that the head of a department could "forthwith remove" an employee where there was ground to believe "retention of such employee would be inimical to the public welfare". The removal could be "made without other formality than that the reasons shall be a matter of confidential record, subject, however, to

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[16] When invoking history, the government repeatedly cites *Galvan* v. *Press*, 347 U.S. 522 (Resp. Br. 20, 29, 41). The government's reliance upon that case in this context is quixotic. For in *Galvan*, this Court decided that the executive could constitutionally deport an alien who, in the words of the government (Resp. Br. 29), was "shown to have been willingly a member of the Communist Party from 1944 to 1946 although *not shown to have been aware* of its advocacy of violent overthrow of the Government." (emphasis added) But in *Wieman* v. *Updegraff*, 344 U.S. 183, a case involving limitations on the power over government employees, it was *precisely* this "indiscriminate classification of innocent with *knowing* activity" which invalidated the statute (344 U.S. at 191). In other words, the Court has held that what the government can do in cases involving aliens, it cannot do in cases involving citizens who are governmental employees.

inspection by the Civil Service Commission." Such a procedure is far removed from a formal finding that "there is a reasonable doubt as to the loyalty of a person" made after an ostensible hearing.[17]

The fact is that issues of loyalty and security received scant attention before World War II. The Civil Service rules prohibited questioning applicants as to their political views or affiliations. 5 C.F.R. § 1.2 (Cum. Supp. 1943). During World War II, the War and Navy Departments and the Coast Guard were authorized to remove an employee "summarily" when such "immediate removal is, in the opinion of the Secretary concerned warranted by the demands of national security". 54 Stat. 679, 713, 50 U.S.C. App. § 1156 (1946),[18] see *Bontecou*, op. cit. note 3, *supra*, pp. 12-13. The employee was entitled to be "fully informed of the reasons for such removal". The 1947 executive order establishing a loyalty program, replete with a panoply of boards, hearings, and formal findings is without any precedent in American history.

**E. The Authorities Cited by the Government Are Inapposite**

The government reasons that since the power to remove is unqualified, the establishment of a loyalty program in connection with discharge is likewise "a matter of executive discretion" (Resp. Br. 31). But power cannot be exercised without regard to the consequences. Power otherwise constitutional may be exercised in an unconstitutional way.

In other situations the courts have held that power confided to the executive by the Constitution is not

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[17] The government relies upon President Wilson's practice at one point (Resp. Br. 71) and then attacks such summary dismissal procedure at a later point in its brief (Resp. Br. p. 102, fn. 45).

[18] This act was superseded by the Act of August 26, 1950, 64 Stat. 476, 5 U.S.C. 22-1 ff. which authorizes certain agencies in their "absolute discretion and when deemed necessary in the interest of national security, [to] suspend, without pay, any civilian officer or employee * * *."

absolute, but must be exercised in accordance with appropriate constitutional limitations. Thus, in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, this Court referred (299 U.S. at 320) to

> "the very *delicate, plenary* and *exclusive* power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress *but which, of course, like every other governmental power, must be exercised in subordination of the applicable provisions of the Constitution.*" (Emphasis added)

Jurisdiction over aliens has been characterized as "inherent in the executive power", *U. S. ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542, and was described by this Court in *Fong Yue Ting* v. *United States*, 149 U.S. 698, 707 as "absolute and unqualified". But since *The Japanese Immigrant Cases*, 189 U.S. 86, this Court has held that aliens cannot be deported without due process. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33. And due process has been held to be denied in deportation cases where the executive relied upon secret testimony or failed to produce for cross-examination witnesses whose testimony had been relied upon. *Unger* v. *Seaman*, 4 F. 2d 80, 81 (8th Cir.), *In re Sugano*, 40 F. 2d 961 (S.D. Cal.); *Maltez* v. *Nagle*, 27 F. 2d 835 (9th Cir.).

The government seeks support in two cases involving the exclusion of alien immigrants, *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, and *Shaughnessy* v. *Mezei*, 345 U.S. 1 (Resp. Br. 23, 57). The government reasons that since executive action based upon confidential information was upheld in these cases, by parity of logic it may be sustained here (Resp. Br. 58). We think the government's reliance upon these cases is misplaced. The privileges that are accorded or withheld from alien immigrants who have not even been admitted to the country scarcely furnishes a just or appropriate yardstick for

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IN THE

# Supreme Court of the United States

OTOBER TERM, 1954

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No. 376

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JOHN P. PETERS, *Petitioner,*

v.

OVETA CULP HOBBY, ET AL., *Respondents.*

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## APPENDIX TO REPLY BRIEF FOR THE PETITIONER

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As Appendix to our Reply Brief we reprint the story of the trial and acquittal of Beatrice Murphy Campbell which was published in The Washington Post and Times Herald, April 17, 1955, page E-1, Col. 1. We think it relevant because it is a graphic description of the power which the Department of Justice is asking this Court to approve.

THURMAN ARNOLD,
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measuring the rights of citizens. Compare *Wieman* v. *Updegraff* with *Galvan* v. *Press*, note 16 *supra*.

In *United States* v. *Nugent*, 346 U.S. 1, upon which the government relies, the Department of Justice hearing at which the FBI report was withheld was merely "advisory"; the final decision was vested in the Appeal Board which was free to disregard the Department's recommendation. Moreover, as the Court recently explained in *Simmons* v. *United States*, 23 L. W. 4127, 4129 (March 14, 1955) "We permitted the FBI report to remain secret because we were of the view that other safeguards in the proceeding, particularly the furnishing of a fair resume, maintained the basic elements of fair play." In any event, a man is not stigmatized or disgraced if he is denied an exemption from service in the armed forces.

The government argues that a discharge for disloyalty is different only in degree and not in kind from a discharge for theft or bribery and that individuals have been dismissed on these grounds without a fair hearing. (Resp. Br. 21-22, 56). Had Dr. Peters been stigmatized as a thief by an executive board under a similar formal program after a quasi-judicial hearing without an opportunity to confront his accusers his constitutional rights would have been equally violated.

The bribery analogy used by the government is not in point. It is unthinkable that the government would attempt to establish bribery, theft or other specific offenses by the methods employed in this case. There is no claim of a vast nationwide conspiracy headed by men of incalculable ingenuity to subvert government officialdom as a whole into a tendency to take bribes. The reasons advanced by the government for the use of anonymous informants simply do not exist in bribery or theft cases.

Furthermore bribery or theft involves a trial for what a man has done. Disloyalty procedure tries the accused for what he had thought and said and, therefore, *may* do. A bribery or theft case does not involve First Amendment considerations; a loyalty case does.

### F. Confrontation Will Not Impair the Government's Secret Information Services

The government argues that confrontation is not required even if the due process clause is held to be applicable to this case (Resp. Br. 59-70). It concedes that a procedure which denies "confrontation and cross-examination may, in some circumstances, be 'patently' arbitrary" (Resp. Br. 60). But it argues that it should not be compelled "to choose between disclosure and retention of employees as to whose loyalty there is a reasonable doubt" (Resp. Br. 24).

It is important to note that Petitioner does not claim that in exercising normal managerial functions the executive cannot collect or rely upon confidential information in appointing and dismissing employees. It can do so in the same manner as any private employer. The question is whether information so gathered can be used, without disclosing the source, in formal proceedings which lead to an adjudication of disloyalty to one's country. The government posits false alternatives. The choice is not between disclosure or retention of disloyal employees. It is (i) between the traditional and customary mode of removal in order to "promote the efficiency of the service" (5 U.S.C. § 652(a)), in which the government is free to use or not to use confidential information, or (ii) full disclosure to the employee in connection with a fair hearing where opportunity is given to explain and refute.[19]

In addition, it is an exceptional case where an undercover agent must be exposed in a loyalty hearing. Actually it is the unlimited right to protect gossip which is involved

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[19] The government acknowledges (Resp. Br. 65) that in a "criminal prosecution, such as treason or espionage * * * the Government must choose between disclosure and non-prosecution." Not only can the government not secure a conviction on the basis of secret testimony, but it must make available to the defendant information in its possession which might *exculpate* the defendant. *United States* v. *Andolschek*, 142 F. 2d 502 (2d Cir.); *United States* v. *Beekman*, 155 F. 2d 580 (2d Cir.); *United States* v. *Grayson*, 166 F. 2d 863 (2d Cir.).

here rather than protection of important paid secret informers. Data gathered by such persons is apparently rarely involved in loyalty proceedings. The Chairman of the Loyalty Review Board of the Second District (the New York area) between 1948-1950, Ernest Angell, recently agreed in testifying before a Senate Committee that there is "no doubt whatever" that "the overwhelming bulk of the total derogatory information which you see in the security and loyalty cases comes from the casual informer, like the corner grocer and the neighbor and the college classmate, rather than from people whom the Federal Bureau of Investigation has planted in a Communist underground." *Hearings Before Subcommittee on Reorganization of the Committee on Government Operations on S. J. Res. 21*, 84th Cong., 1st Sess., p. 1260 (March 17, 1955) (stenographic transcript). He testified that in the course of his duties he had examined "many hundreds" of FBI investigative reports and that the proportion of those in which derogatory information was based upon the direct personal knowledge of an undercover agent was "very, very low and small". *Id.* at pp. 1256-1259.

The government states that it is necessary to preserve the anonymity of casual informants because such persons do not wish to become "involved in a public controversy" (Resp. Br. 62). Pressed to its logical conclusion, the Government's argument would make impossible rational administration of justice. The extremes to which the government has pressed the category of casual "confidential informants" is indicated by a recent case in this Court, *Simmons* v. *United States*, 23 L. W. 4127, 4129 (March 14, 1955). The government characterized as a "confidential informant" an individual who told an FBI agent that an applicant for exemption from the draft was "a rather heavy drinker and crap shooter in and around local taverns and pool halls."

Absent confrontation, the employee is frequently incapable of defending himself. "He is rarely able to form

a clear impression of the nature of the case which the FBI report makes out against him. It is quite conceivable that he may prepare his defense on an erroneous inference. It is possible that he may not be able to formulate any defensive position whatever. His only defense may have to be an affirmative statement of loyalty, buttressed by as many statements of his good character as he can obtain. It is impossible for him to know when he has sustained a burden or proof sufficient to result in a determination of loyalty. The employee's opportunity to defend his reputation may thus be hopeless." Emerson and Helfeld, *Loyalty Among Government Employees,* 58 Yale L.J. 1, 102 (1948).

Confrontation, moreover, is vital not only to the employee "who may otherwise be victimized by the malice or mistake of the informer, or the erroneous recording of the investigator," but it is equally "valuable to the body that must make a decision concerning the facts." Gellhorn, *Security, Loyalty, and Science* 207 (1950). Without an opportunity to ascertain the credibility of the informant, the board is compelled to abdicate judgment to the federal police, pp. 23-24, *infra.* And as this Court has stated, "[j]udgment on issues of public moment based on * * * evidence not subject to probing by judge and opposing counsel, is apt to be treacherous." *Eccles* v. *Peoples Bank,* 333 U.S. 426, 434.

In any event, "[w]hen the Constitution requires a hearing, it requires a fair one . . . " *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, 50. Confrontation and cross-examination are essential ingredients of a fair hearing. As Mr. Justice Black stated for the Court in *In re Oliver,* 333 U.S. 257, 273:

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and *these rights include, as a minimum, a right to examine the witnesses against him,* to offer testimony, and to be represented by counsel." (emphasis added)

### G. The Loyalty Board Cannot Exercise Independent Judgment in Evaluating a Secret Report

Stripped to its essentials, the loyalty program delegates to the federal police the power to decide the disloyalty of anyone connected with the government even in the most casual capacity and to impose on such persons stigma and disgrace. This fact emerges clearly from the analysis of the investigative technique in loyalty cases by an independent scholar who is cited in the government's brief. Bontecou, *The Federal Loyalty-Security Program* 85-86 (1953).

Miss Bontecou explains that in cases involving confidential informants "whose identity is disguised by the use of a symbol, the [investigator's] report is *digested and summarized* in the Bureau before it is submitted to the agency which is to evaluate it." (Id. at 85). The FBI "strikes out irrelevant material" and it also "conceals the source of the information and the method by which it has been obtained, whether from an undercover agent, a stool pigeon, a check to determine the source of incoming mail, a telephone tap, or by other means." (Ibid.) The Bureau transmits to the Loyalty Board panel "a *general evaluation of the informant* such as a statement that he is of known reliability, that he has furnished information in the past which has proved reliable, or that his reliability is uncertain." (Id. at 86). Miss Bontecou states that "Mr. Hoover himself admits that this practice amounts to a departure from the general rule and that, when it is followed, *the Bureau has evaluated the material it submits.*" (Id. at 86).

The process by which intelligence data is gathered and transmitted inevitably involves evaluation. The agent who collects the information in the first instance, in drafting a report of an interview, must sift and choose the material he deems pertinent from the mass of data which has been orally given to him. The questions he asks or fails to ask also involve selection. If his superior condenses or summarizes, there is a further process of editing.

There, in front of my fellow employes, I was asked to hand over my building pass. In a gesture of innocence, I handed over two passes. Cold eyes stared at me. Why two passes?

Once, months before, I had misplaced my pass and on pay day had asked for another to use for identification at the bank. I have a penchant for saving things, and when I finally found the first one weeks later, I just kept them both in my wallet. The explanation was so simple!

Yet I began to feel guilty. I was to know that feeling many times in the next four months—that feeling that if here in America one could be put through so much, maybe there was something I had forgotten. It was a feeling of knowing I was right, but of trying to find out the why of what was happening to me.

My fellow employes sat around me, knowing that something was going on. Later, I was to read these ironic words in my letter of suspension: "This and all subsequent communications addressed to you will be marked personal in keeping with the policy . . . to regard all proceedings as personal between the agency and the employe. This policy is intended to protect the employe."

And there I stood before my fellow employes, being humiliated. Was that protection? Was that personal between myself and the agency? How much more public could an accusation have been?

Then the Personnel Director and I went to the elevator and down to the first floor. He took me all the way to the door and watched me go out—as if I could not be trusted to go that far by myself, the same door through which I had been coming and going for eight years! I was told that if I wanted my personal belongings (which I had refused to try to carry with me) I must phone, and one of my fellow employes would bring them down to the door to me.

Surely the charge against me which warranted such humiliating treatment, such safeguards against my presence in a Government building, must be grave. There must be definite evidence of attempts to overthrow the Government,

The Loyalty Review Board panel cannot do anything but accept the "summary" and "evaluation" transmitted by the FBI. It does not know whether relevant material has been deliberately or inadvertently omitted. It has no independent means of knowing whether the secret informant is a sage or a fool, a patriot or a concealed Communist, a reputable citizen or a Harvey Matusow. And yet as a report by a Joint Congressional Committee on Atomic Energy pointed out:

> "An informant may perhaps give the FBI highly unfavorable advice but when placed under oath before a local board, deny all that he had said, admit that he knows little or nothing about the employee, and admit further that he bore him a grudge." Sen. Rep. No. 1169, 81st Cong., 1st Sess. pp. 59, 68 (1949).

In sum, the conclusion is inescapable that the Loyalty Review Board can not "weigh" and "appraise" the evidentiary value of a secret FBI Report in any judicial sense. Where secret reports are the basis of its finding the essential factors which should control the decision rest in the judgment of the Department which makes up the secret dossier. The power to impose stigma and disgrace is thus delegated to the Federal Bureau of Investigation. Due process is denied when those who are authorized to decide are denied access to information which is essential to the decision.

## CONCLUSION

We believe that the only issue in this case is whether the government can stigmatize a citizen as disloyal to his country after a formal hearing without due process of law. The government argues that this is a dismissal case, and it professes to see no difference between this case and a dismissal on any other ground or by any other procedure. We think that the government itself has recognized the difference by the elaborate regulations and proceedings for loyalty and security cases which it has not seen fit to set up for other types of discharge.

The difference becomes crystal clear when a loyalty discharge is compared in its important and significant particulars with other informal types of dismissal.

1. The loyalty program was publicly proclaimed in E. O. 9835 as a method of "maximum protection" of the government from its enemies and at the same time a procedure which gave "equal protection" to the employee from "unfounded accusations". No such pretense is advanced in informal procedure.

2. The loyalty program purports to judge employees on "all the evidence". The informal proceedings make no such promise.

3. The loyalty and security programs set up boards which are independent of the personnel officers who hire and fire. These boards are given great dignity. The Attorney General takes pride in pointing out that the members are in *Who's Who* (Resp. Br. 103, fn. 46). The accused is promised that the independent judgment of these boards will determine his case. But in every case where a secret F. B. I. report is the basis of the board's decision the accused is deprived of the independent judgment of the board. The secret report on which the board decides is summarized and edited, by the F.B.I. which also evaluates the reliability of the informant. Thus independent judgment of such a report by the board is impossible.

The informal procedure holds out no promise for independent judgment by persons outside of personnel management. No particular dignity or sanctity is given to these judgments by personnel officers.

4. Loyalty and security hearings take as their subject matter the entire life of the accused. They make it possible for the board to exercise hindsight judgment during four periods of history. The first of these periods is the early part of the Russian Revolution which some men hated for its cruelty and its radical philosophy while others thought it was a historical event which might free Russia from the tyranny of the czars. The second of these periods followed the recognition of Russia by the

United States. During that time distinguished men like Ambassador Davies wrote his *Mission To Moscow* which might now easily be taken as evidence of Communist tendencies in spite of the fact that it was an entirely honest appraisal. The third period followed the German-Russian pact in 1939. The fourth period covered the years during which Russia became our ally in the war, our associate in the Nuremberg trials, and our colleague in founding the United Nations. The last is the period of the cold war during which hatred and suspicion of Russia has become so intense that some men think they are entitled to view any opinion of the accused favoring Russia in any of the former periods as cumulative evidence of disloyalty. The persons who initially edit, summarize and determine the relevance of associations and opinions in all these historical periods are agents of the F.B.I. Valuable as the F.B.I. is as a police agency, they are not qualified to be and cannot be objective historians. Indeed, no group of men is less adapted for this sort of task than the police.

By contrast the atmosphere that surrounds ordinary discharge does not compel an exhaustive inquiry and appraisal into a man's statements and associations covering his entire lifetime, or an appraisal in the light of complex historical events.

5. The loyalty board hearings, as we have shown, in actual effect endow the Department of Justice with power over every other agency of government to whom it is authorized to furnish its secret reports. No one, not even an Ex-President of the United States, can have formed an opinion contrary to these secret reports without risk of a future attack upon his own character as a security or loyalty risk. Under this system a prejudiced Attorney General could impose his prejudices on the personnel of every government department. Mistakes in these reports can never be corrected because they can never be discovered. Nor can malice and bias ever be exposed. No man can be an investigator, accuser and evaluator of his own accusations. Even the most upright cannot escape their own prej-

or of passing secret documents, or of leaking secret information. But they were comparatively slight: "That in 1940-1941, I was 'reportedly' a member of the Washington Bookshop Association; that I attended functions of the Washington Bookshop Association; and that I tried to induce others to join" . . . an association now on the Attorney General's list of subversive organizations.

When I walked out of the building, I walked into a nightmare. I had no savings. I had spent the last 14 years in a cast or brace for the spinal condition. My medical bills had been enormous. Two weeks previously, my son had given up a good job on the West Coast and come home because he felt that my health made his presence imperative. He was still unemployed.

Now there would be the further burden of legal fees. There was no question in my mind about fighting the charges. One always fights for the truth. I had been brought up on the words, "I promised my Lord that I would not; that I wouldn't run away when the battle got hot."

Here is a good time to say that no matter what the state of the pocketbook, a lawyer is absolutely necessary to fight a security case. In A. J. Spere, I had one of the best. That was of great comfort to me.

Several years before, a VA personnel man had told me: "The fact that you write (book reviews) for the New York Times (I had worked up to that, and was proud of it) and talk on the radio (which, my supervisor at the time pointed out, the President of the United States did also) will be used against you." His argument was that "old fogies" believed that decent people didn't talk on the radio and write for the newspaper! Was that why the charges originated?

About a month before, I had been questioned by an agency official about my "reported" membership in the Bookshop Association. Over the years I had been asked the same question in more than a hundred (literally) different ways. My answer was always the same:

udices in the vague area of loyalty and security covering as it does the lifetime of an individual.

The informal procedure may of course lead to mistaken discharges. But this is only an incident to the business of making a living. It is a risk which men must assume in a free society. It is not endowed with solemn sanction of judicial procedure. It does not have the pretense or trappings of a trial and hence does not cloak unjust official action with the apparent impartiality of our trial procedure.

6. Since the formal procedure appears to be a fair trial of men for an offense that is akin to treason those who attack it are linked with the enemies of this country. This is evident from the following testimony of Assistant Attorney General Tompkins on March 8, 1955 before the Senate Sub-Committee on Reorganizations of the Senate Committee on Government Operations:

> "It is becoming increasingly clear that the current attack against Government Witnesses and informants of the Federal Bureau of Investigation *has its roots in a Communist effort to stem the successful compaign of this Government to eliminate the subversive threat of Communism to our internal security.* It has as its objective the hamstringing of the FBI's informant system and there is no more effective way of attempting to do this than through the demand for confrontation of witnesses in these non-criminal matters."

Thus those who argue for confrontation are linked with traitors. No high government official has denounced those who criticize Civil Service regulations as aiding the Communists in their efforts to infiltrate the government.

7. The terrific impact of our formal loyalty and security procedure has been felt over the entire world. In a short period of time it has provided us with more *causes celebre* than our entire system of judicial trials over a quarter of a century. There is the Oppenheimer case, the John Peyton Davies case, the extraordinary Wolfe Ladejinsky case, the spectacle of Dr. Condon being tried and acquitted again

and again till he was driven from government and then even from his job in private industry. There are the cases of John Stewart Service, Dorothy Bailey, and finally that of Dr. John Punnett Peters. It is only out of proceedings that have the appearance of judicial process that such public attention can arise.

In contrast all these persons could have been released by an informal procedure with only passing comment. Consultation with Dr. Oppenheimer could have been broken off quietly and without fanfare. Dr. Peters' term could have been left to expire without a formal finding of disgrace. To classify a procedure such as this as a mere incident to the power of dismissal is simply to deceive ourselves. We can be sure that we will deceive no one else.

8. One final element in this procedure is, we think, conclusive evidence that the executive is here seeking to exercise judicial or quasi-judicial power. In this case no conceivable managerial reason existed for branding Dr. Peters disloyal to his country. Not even the interest of government economy can be urged. No worse test case could possibly be selected.

Why then does the government not reverse the board in this particular case since Dr. Peters' term has already expired, and await some better set of facts to present to this Court? Why does a high Justice Department official give an interview to the press in which he states:

> "The Justice Department wants as much to win public opinion for the Government's loyalty-security program as it does to get a clear-cut Supreme Court decision this year upholding dismissal of Dr. John P. Peters under that program."[20]

The reason is that the Attorney General, as others have done in the past, wants the sanction of judicial process to dignify the executive action in this case. This is a familiar political phenomenon in history. The Russians

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[20] *The Washington Star*, March 28, 1955, p. 4, Col. 3.

attempted to satisfy the same desire in their early purge trials of 1937. There was no lack of executive power in the Russian Government to dispose of those defendants without the finality of a trial. But instinctively the Russian executives wanted to dress their acts in seemly judicial clothing. By doing so they were enabled to appear righteous and thus to allay public doubts and misgivings. It also enabled them to deflect public criticism. No one can criticize a state which disposes of its enemies by fair means. Even an unjust decision is protected if the process is fair. It is the same instinctive desire which is back of the defense in the Peters decision.

No doubt the government would have preferred a better test case than that of an eminent senior professor at Yale University with only a casual connection with the government who was vouched for by distinguished men he had known all his life. But the judicial robes in which the government had clothed the Loyalty Review Board forbade its reversal by executive action. Had the government reversed the board by executive action the illusion of independent judicial judgment would have been destroyed. And so the Attorney General has no alternative except to defend the egregious error of this Loyalty Review Board.

If this Court declares the procedure unconstitutional it will have done an inestimable favor to the Department of Justice. This is because history tells us that attempts to obtain judicial sanctity for arbitrary executive acts without the substance of a fair trial blow up in the faces of those who initiate them. This was true in the case of Joan of Arc. This was true in the case of the Russian purge trials. That the nature of the process here is judicial is conclusively demonstrated by the fact that the government, though it has the legal power to do so, cannot remove the stigma from Dr. Peters without seeming to impair the authority of its alleged independent tribunals. This salient fact should remove all doubt that the proceeding here is judicial in character and must be conducted with due process.

Other cases involving government employees may come before this Court which may be in a twilight zone between the managerial and judicial function. But this case does not require this Court to fix with precision the line beyond which the Government cannot go in discharging employees without a fair hearing. If all the considerations which we have discussed above do not push it into the area where due process is required then there is no such line. This government cannot set up a procedure which is essentially judicial with one hand and rob it of due process with the other without violating the Constitution of the United States.

Respectfully submitted,

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